

REMARKS

Applicants request continued examination on the merits in view of the following election with traverse.

1. Status of the Claims

Claims 1-9, 11-16, 21-23 and 27-30 stand pending and subject to restriction / election.

2. Restriction Requirement

The Office restricts claims 1-9, 11-16, 21-23 and 27-30 to one of the following groups:

Group I: Claims 1-9 and 21-23, drawn to process, and

Group II: Claims 11-16 and 27-30, drawn to a product.

3. Election of Group II without Traverse

Applicants elect **Group II** (claims 11-16 and 27-30) **without** traverse.

4. Election of Species with Traverse

The Office requires an election of species as set forth at page 4 of the Office Action.

Applicants elect the following species **with** traverse:

A: (ai) *Rhizopus delemer*,

B: (a) The product of claim 12 or 13; and

Composition: (B1) Human nutritive composition.

Claim 11 reads on the elected species at least for the reasons set forth in the Decision on Petition, e.g., pages 4-5 (claim 11 to be examined as a linking claim under MPEP § 809). At least claims 11-13 and 27-29 read on the elected species. Traverse is on the following grounds.

First, unity of invention under PCT rules is determined with respect to ***independent*** claims only. *See also* Grant of Petition, page 5 (generic claims must be considered).

Second, the Office indicates that this is a “species election” but fails to cite MPEP § 803.02 as the only authority for making such a requirement. The Office must state that the species election is a “provisional” election under MPEP 803.02 in its next communication. *See*

Decision on Petition, page 3 (citing MPEP § 814, which requires the Office to provide a clear and detailed record of the restriction requirement).

Third, MPEP § 803.02 requires the Office to provide an explanation why the species are “distinct.” In the present case, the Office does not explain why species united under common generic claim 11 are “distinct,” particularly in light of MPEP §§ 806.03 (prohibiting species elections, where claims define the same essential features) and/or 806.04(f) (prohibiting species elections, where species overlap in scope).

Finally, the present election fully responds to the requirement for election of species. *See* MPEP § 818.03 (Applicants make their own election); *see also* MPEP § 821.03, last paragraph (prohibiting the Office from issuing a Notice of Non-Responsive Amendment, where a restriction is made under MPEP § 803.02).

5. Rejoinder

Applicants note with appreciation the indication that Group I will be eligible for rejoinder upon allowance of Group II.


CONCLUSION

The claims are ready for examination on the merits, which is respectfully requested. EXCEPT for issue fees payable under 37 C.F.R. § 1.18, the Commissioner is hereby authorized by this paper to charge any additional fees during the entire pendency of this application including fees due under 37 C.F.R. §§ 1.16 and 1.17 which may be required, including any required extension of time fees, or credit any overpayment to Deposit Account 50-0573. This paragraph is intended to be a CONSTRUCTIVE PETITION FOR EXTENSION OF TIME in accordance with 37 C.F.R. § 1.136(a)(3).

Respectfully Submitted,

Date: May 26, 2010

By: _____


Brian K. Lathrop, Ph.D., Esq.
Registration No. 43,740

DRINKER BIDDLE & REATH LLP
Customer No. **55694**
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209
Tel. No.: (202) 842-8800
Fax No.: (202) 842-8465